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JAN 26 1973

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No. 72-949

In the

Supreme Court of the United States

OCTOBER TERM, 1972

THE FORT WORTH NATIONAL BANK, INDIVIDUALLY AND THE FORT WORTH NATIONAL BANK, TRUSTEE UNDER THE WILL OF D. M. COGDELL, DECEASED, FOR THE BENEFIT OF MARION P. COGDELL AND FOR THE BENEFIT OF CHARLOTTE COGDELL ETGEN,

Petitioners,

v.

DAVID MARTIN COGDELL, JR. AND WILLIAM MUNSEY COGDELL, INDIVIDUALLY, AND AS INDEPENDENT EXECUTORS OF THE ESTATE OF D. M. COGDELL,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents oppose the Petition for Writ of Certiorari and respectfully present the following:

QUESTIONS PRESENTED

Phrasing the questions presented is perhaps a matter of choice but we respectfully submit that the questions may be

more precisely stated in the factual posture of the case as follows:

(1) When a national bank files suit outside the county of its residence in its capacity as Trustee, does it waive its right to be sued in its capacity as Trustee in the county of its residence under 12 U.S.C., § 94, as to a counterclaim arising out of or incidental to the subject matter of the suit?

(2) If so, does such waiver also extend to a cross-action or third-party action against it in its individual corporate capacity arising out of or incidental to the subject matter of said suit?

STATEMENT OF THE CASE

Petitioner's statement is glossed with certain immaterial matter and we simplify as follows:

THE FORT WORTH NATIONAL BANK, as Trustee under the Will of D. M. Cogdell, Deceased, filed suit in the 132nd District Court of Scurry County, Texas against JONISUE COGDELL STIFF, DAVID MARTIN COGDELL, JR. and WILLIAM MUNSEY COGDELL, as Independent Executors of the Estate of D. M. Cogdell, Deceased, and individually, asserting causes of action for Will construction, accounting, alleged self-dealing and breaches of fiduciary duty of the Executors, and alleged debts to the estate. DAVID MARTIN COGDELL, JR. and WILLIAM MUNSEY COGDELL, as Majority Executors of the Estate, and individually, filed a pleading called "First

Amended Cross-Action" against the BANK, individually and as Trustee, asserting causes of action for breach of contract, fraud, misrepresentation and deceit. The "cross-action" was in fact a counterclaim against the BANK as Trustee and a third-party action against the BANK individually. The BANK, individually and as Trustee, filed pleas of privilege to have the "cross-actions" transferred to Tarrant County, the county of its domicile, relying upon 12 U.S.C., § 94.

The District Court of Scurry County overruled the pleas and the Court of Civil Apeals for the Eleventh Supreme Judicial District of Texas, at Eastland, Texas, affirmed, holding that while 12 U.S.C., § 94, fixes venue in an original suit against a national bank in the county of the bank's domicile, the matters asserted in the cross-action relate to matters arising out of or incidental to the subject matter of the suit filed by the BANK in Scurry County and the BANK therefore waived its privilege to be sued in Tarrant County with respect to such matters. The Supreme Court of Texas refused Writ of Error for lack of jurisdiction and the Judgment of the Court of Civil Appeals thus became final.

REASONS FOR DENYING CERTIORARI

It is settled that 12 U.S.C., § 94, is mandatory. *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 565, 83 S. Ct. 520, 9 L. Ed. 2d 523 (1963). It is further settled that the statute creates a privilege in favor of the BANK which it may waive. *First National Bank of Charlotte v. Morgan*,

132 U.S. 141, 145, 10 S. Ct. 37, 33 L. Ed. 282 (1889), and see *Mercantile National Bank v. Langdeau*, supra, at 561, Note 12, and *Michigan National Bank v. Robertson*, 372 U.S. 591, 594, 83 S. Ct. 914, 9 L. Ed. 2d 961 (1963).

The Texas Court of Civil Appeals at Eastland expressly recognized the holding of *Langdeau* but held that the matters asserted in the cross-action arose out of and were incidental to the subject matter of the main suit and that under the established Texas law the BANK by filing its suit in the District Court of Scurry County, Texas waived its privilege under 12 U.S.C., § 94, to be sued in Tarrant County, the county of its domicile, citing *Zachry v. Robertson*, 214 S.W. 2d 949 (Tex. Sup. 1948).

If our research is not faulty, this Court has not expressly ruled on what conduct of a national bank will constitute a waiver except in *First National Bank of Charlotte v. Morgan*, where it held that failure to assert the privilege until appeal constituted a waiver. The issue of waiver was not presented in *Mercantile National Bank v. Langdeau* and it was not ruled on in *Michigan National Bank v. Robertson.*

We submit however that the question of waiver presented here has been adequately answered by other courts and is not of sufficient import to require this Court's attention.

Substantially in point is *Exchange National Bank of Chicago v. Abramson*, 45 F.R.D. 97 (U.S.D.C.) Minn. 1968), in which the Court held that the bank, by filing suit in a court in which it otherwise would not have been subject to

suit, waived its venue privilege with respect to counterclaims filed in that suit. At pages 105-106, the Court said:

> "It is well settled that the section (§94) creates a personal privilege for national banks, and that the privilege may be effectively waived by conduct or consent to suit in an otherwise improper forum. * * * The narrow question here is whether the plaintiff bank, by bringing its action in this court to enjoin Abramson, waived its privilege to be sued only where located for venue purposes. Both parties agree that but for waiver of such privilege, the plaintiff bank is established and located in Illinois for purposes of 12 U.S.C. § 94, and that an original proceeding in this Court against the bank could not be maintained.
>
> The Court holds that plaintiff waived its right to object to improper venue by commencing in this district an action to enjoin Abramson from various acts of participation in the action styled 'Draft Complaint.' Under the rule announced in *General Elec. Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 53 S. Ct. 202, 77 L. Ed. 408 (1932), a plaintiff waives venue privileges with respect to any counterclaim, either permissive or compulsory, when he commences an action in a forum where venue otherwise would not lie."

Also germane are *Continental National Bank v. Folsom*, 3 S.E. 269 (Ga. Sup. 1887), and *Lichtenfels v. North Carolina National Bank*, 132 S.E. 2d 360, 1 A.L.R. 3rd 897 (N.C. Sup. 1963).

In *Folsom*, the plaintiff bank, domiciled in New York, instituted attachment proceedings against a Georgia resident in Georgia and filed an attachment bond Upon breach of the bond, suit was instituted against the bank in the Georgia Court. The bank contended that under the federal

statute it could only be sued in New York, the state of its domicile. Rejecting that contention, the Supreme Court of Georgia held that the federal statute did not restrict the jurisdiction in which a national bank could be sued for breach of a bond, where the bank had voluntarily invoked the jurisdiction of the Georgia Court and had filed the bond as a condition precedent to filing its suit there.

In *Lichtenfels*, the bank had accepted appointment as trustee under a will probated in Buncombe County, North Carolina and suit was filed by the beneficiaries against the bank in that county for mismanagement of the trust. The bank sought to remove the case to Mecklenburg County, its home county, asserting the federal statute. Overruling the motion to remove, the Supreme Court of North Carolina stated that the defendant bank was under no compulsion to handle the trust estate and that by accepting the appointment under the conditions imposed by the North Carolina law it submitted to the jurisdiction of the Superior Court of Buncombe County. This ruling was made in full recognition of *Mercantile National Bank v. Langdeau, Michigan National Bank v. Robertson* and *First National Bank of Charlotte v. Morgan.*

The rule apparent from these cases is that when a national bank invokes the jurisdiction and venue, or otherwise submits itself to the jurisdiction and venue, of a court in a district or county other than the district or county of its domicile, it waives its jurisdiction and venue privilege with respect to the subject mater upon which it has invoked or submitted to the jurisdiction and venue of a district or county in which it is not domiciled. This is consistent with the rule of waiver

laid down by the Texas Supreme Court in *Zachry v. Robertson*, 214 S.W. 2d 949 (Tex. Sup. 1948), wherein the court held that a plaintiff who files suit in a county other than the county of his domicile waives his right to be sued in the county of his domicile on a counterclaim or cross-action arising out of or incidental to the subject matter of the main suit. *Zachry* did not involve a national bank but there is no reason why the rule of waiver applicable to national banks should be any different from that applicable to other litigants. When petitioner filed its suit in Scurry County, it was charged with knowledge of the Texas rule of waiver and there is no reason why it should be relieved therefrom.

Petitioner contends that waiver can arise only from voluntary and intentional relinquishment, citing *Buffum v. Chase Nat. Bank of City of New York*, 192 F. 2d 58, 61 (7th Cir. 1951), and further contends that its action in filing suit in Scurry County was not voluntary because it was compelled to file the suit there if it was to carry out its duties as Trustee. A similar contention was rejected by the Supreme Court of North Carolina in *Lichtenfels v. North Carolina National Bank*, supra. In that case the bank, domiciled in Mecklenburg County, accepted appointment as trustee under a will being administered in Buncombe County. The bank was sued for accounting in Buncombe County and filed a motion to transfer the case to the county of its residence. The Supreme Court of North Carolina held that the bank was under no compulsion to accept the trust; when it did so, it knew that it would be subject to control of the Superior Court of Buncombe County and it thereby waived its venue privilege. In

the case at bar, petitioner was under no compulsion to accept and administer the trust created under the Will of D. M. Cogdell, Deceased, and it was under no compulsion to file the suit. It could act or not and it could file suit or not, at its election. In every sense its action was voluntary and when it filed the suit it was charged with knowledge of the Texas law of waiver.

Presumptively and litigant would prefer to litigate claims against it in its home county, but when it goes into another county as plaintiff sound policy requires that it defend there any counterclaim, cross-action or third-party action arising out of or incidental to the subject matter of the main suit. Thus the rule of waiver, and if this rule were not applied to national banks, they would be permitted to fragmentize litigation contrary to the universal rule that abhors unnecessary multiplicity of suits.

We are not unmindful of the dual status of petitioner in its individual corporate capacity and its capacity as a trustee. We further recognize that the trusts under the Will of D. M. Cogdell, deceased are legal entities which may sue and be sued as such, but the trusts act only by and through the trustee, the BANK. For its acts as Trustee the BANK may be personally liable both in contract and tort. See *Scott on Trusts* (3rd Ed.), §§ 262 and 264, and the Texas Trust Act, Article 7425b-19.C. and 21.D, Vernons Tex. Civ. Statutes. The "cross-action" in the case at bar placed in issue the BANK'S liability both as Trustee and individually with respect to the subject matter on which it filed suit in Scurry County. Unquestionably in filing the suit as Trustee it

waived venue upon the counterclaim against it as Trustee and we submit that it would be an anomalous twist of the law if the BANK could not be held to answer individually in that same court with respect to its individual liability arising out of the very subject matter upon which it sued as Trustee. We have found no case which so holds and petitioner cites none.

At page 12 of its petition herein, the BANK quoted from *First National Bank of Charlotte v. Morgan* to the effect that the national bank venue statute was enacted

> "* * * for the convenience of those institutions, and to prevent interruption in the business that might result from their books being sent to distant counties in obedience to process from state courts."

and argues that this policy would be violated if it is required to answer and produce its records for a long trial in Scurry County 220 miles from its home base in Tarrant County. This argument is clearly without merit. The main case which it filed as Trustee in Scurry County obviously will require the attendance of its personnel and the presence of its records pertaining to the Estate of D. M. Cogdell, deceased, and those same personnel and records will be required for the cross-action.

CONCLUSION

While the precise questions of waiver here presented have not been determined by this Court, the principle of waiver was announced long ago and petitioner has offered no special

or important reasons (S. Ct. Rule 19) why this Court should grant certiorari to approve or reject the holding of the Texas Court of Civil Appeals that petitioner waived venue under the specific facts of this case.

Certiorari therefore should be denied.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, S. TOM MORRIS, attorney of record for Respondents, certify that three (3) copies of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari have been served upon Petitioners by depositing same in the United States Mail at Amarillo, Texas, postage pre-paid, properly stamped and addressed to petitioner's attorneys of record, as follows:

Robert M. Randolph and
Samuel A. Denny
LAW, SNAKARD, BROWN & GAMBILL
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Fort Worth, Texas 76102

this ____ day of January, 1973.

.....

S. Tom Morris